APPEAL NO. 040258
FILED MARCH 29, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on January 8, 2004. The hearing officer determined that the respondent (claimant) sustained a compensable injury on _____; that she had disability beginning August 7, 2003, and continuing through the date of the hearing; and that she is not barred from pursuing workers' compensation benefits because of an election to receive benefits under a group health insurance policy. The appellant (carrier) files a request for review, contesting Findings of Fact Nos. 3, 4, 5, and 6, and Conclusions of Law Nos. 3, 4, and 5. The main thrust of the appeal is that the claimant was not credible and that the decision of the hearing officer is not supported by the credible evidence. The claimant responds and requests we affirm the decision of the hearing officer.

DECISION

Affirmed.

We believe that the carrier mistakenly references Finding of Fact No. 3 as one of the findings that is contested. That Finding reads: "On _____, Employer had workers' compensation insurance through Travelers Indemnity Company of Connecticut, Carrier." The only evidence presented concerning this matter was Hearing Officer's Exhibit No. 2, which confirms that Travelers Indemnity Company of Connecticut is the carrier. Further, the identity of the carrier was not an issue at the hearing, and there is no argument made in the appeal concerning this finding. We conclude this is a mere administrative error.

The carrier appeals Conclusion of Law No. 5, which reads: "The Claimant is not barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under a group health insurance policy." The carrier, however, does not make any argument in its appeal concerning this Conclusion of Law. The hearing officer did not make a Finding of Fact concerning election of remedies. At the start of the hearing, the hearing officer briefly discussed election of remedies on the record and stated that he would not be taking any evidence on that issue, as the Appeals Panel had ruled that election of remedies was no longer a viable defense. The carrier did not object to that statement, nor did the carrier attempt to put on any evidence concerning election of remedies. In his Statement and Discussion of the Evidence, the hearing officer stated: "Election of remedies is not a viable defense under the 1989 Act. This issue is resolved as a matter of law in favor of the Claimant." Although this statement by the hearing officer is erroneous, we ultimately conclude that any error is harmless.

We last discussed the election of remedies defense at length in Texas Workers' Compensation Commission Appeal No. 030473, decided April 15, 2003. We said:

> With regard to the issue of election of remedies, in Valley Forge Insurance Company v. Austin, 65 S.W.3d 371 (Tex. App.-Dallas 2001, pet. denied), the court of appeals interpreted Section 409.009 of the 1989 Act regarding subclaims as an abrogation of the common law election of remedies affirmative defense and held that an employee does not waive his claim to workers' compensation benefits by pursuing group health insurance benefits. In Valley Forge Insurance Company v. Austin, 46 Tex. Sup. J. 423 (Tex. 2003), the Texas Supreme Court in a per curiam opinion denied the petition for review of the court of appeals decision in Valley Forge and agreed with the court of appeals conclusion that Austin's claim for workers' compensation benefits is not barred by the election-of-remedies doctrine, but noted that the court of appeals did not need to reach its holding that Section 409.009 abrogated the election-of-remedies doctrine where group health insurance is also involved. The Texas Supreme Court cited another case where an appeals court had not applied the holding of the court of appeals in Valley Forge, because doing so would not have changed the result on appeal since there was legally and factually sufficient evidence to support the jury's finding that the employee did not make an informed election to reject workers' compensation benefits by accepting group health insurance benefits. Thus, the Texas Supreme Court stated that it did not reach the merits of the court of appeals' holding and left open the question of whether Section 409.009 abrogates the election-of-remedies doctrine.

We cited Appeal No. 030473, *supra* in Texas Workers' Compensation Commission Appeal No. 030636, decided April 30, 2003, and then continued with the following discussion:

> Whether an election has been made is generally a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 972051, decided November 13, 1997. Critical to a finding of an election of remedies is the determination that the election of nonworkers' compensation remedies was an informed choice. Texas Workers' Compensation Commission Appeal No. 981226, decided July 20, 1998; Texas Workers' Compensation Commission Appeal No. 990525, decided April 16, 1999. The mere acceptance of group health benefits is normally not sufficient in itself to establish an election of remedies. Texas Workers' Compensation Commission Appeal No. 001471, decided August 7, 2000.

Further, from Appeal No. 030473, *supra*:

> The Appeals Panel has held that the carrier has the burden of proving an effective election of remedies, and that critical to a finding of an election of remedies is a determination that the election of nonworkers' compensation remedies was an informed choice. Texas Workers' Compensation Commission Appeal No. 001471, decided August 7, 2000, citing

Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980). In the instant case, there is ample evidence that the claimant did not exercise an informed choice between her husband's group health insurance and workers' compensation benefits, and thus the hearing officer could conclude as he did that the claimant is not barred from pursuing workers' compensation benefits due to an election to receive benefits under a group health insurance policy.

In this case, although the hearing officer precluded any evidence or discussion of election of remedies by his preemptive action, we do not perceive any reversible error. First, there was no objection at that time by the carrier. Second, there is no argument at all in the appeal, asserting why the conclusion that there was no election of remedies was incorrect. Third, because the election of remedies defense is difficult to establish, and the "mere acceptance" of other benefits does not establish an election of remedies, we believe that the hearing officer would not have been persuaded that an informed election of remedies occurred.

The carrier objects to the hearing officer's finding that the date of injury was _____, when the issue from the benefit review conference concerned a date of injury of August 3, 2003. The hearing officer attributed the discrepancy in the dates to confusion on the part of the claimant, and stated that there was no prejudice to the carrier from the slight shift in the date of injury. The carrier argues extreme prejudice from an inability to investigate the new date of injury, or to confirm whether the claimant even worked that day, or to research whether any documentation existed to corroborate the new date of injury.

We have previously noted that "[t]he date alleged does not have to be the date found by the hearing officer as the date of injury. The hearing officer is charged with considering all the evidence to determine when injury occurs." Texas Workers' Compensation Commission Appeal No. 92022, decided March 9, 1992. *See also* Texas Workers' Compensation Commission Appeal No. 92661, decided January 28, 1993 ("the hearing officer is at liberty, if the evidence warrants it, to find that an injury occurred on a different date than the date alleged on the claim."); Texas Workers' Compensation Commission Appeal No. 92350, decided September 8, 1992 ("a hearing officer is not bound only to the date pleaded by a party as the date of injury, if the evidence indicates that the compensable injury occurred on another date."). In this case, there is only one incident that the claimant is claiming as the cause of her injury, and the hearing officer merely made a fact finding that it occurred a day earlier than the claimant originally reported. We perceive no error.

The carrier argues that the hearing officer failed to mention certain evidence that related to the claimant's credibility. The Statement of the Evidence contains a brief statement that even though all of the evidence presented was not discussed, it was considered. The Appeals Panel stated that the 1989 Act does not require that the Decision and Order of the hearing officer include a statement of the evidence and that omitting some of the evidence from a statement of the evidence did not result in error. Texas Workers' Compensation Commission Appeal No. 000138, decided March 8,

2000, citing Texas Workers' Compensation Commission Appeal No. 94121, decided March 11, 1994. The failure to summarize all of the evidence in the Decision and Order does not indicate reversible error.

The issue of whether or not the claimant sustained an injury is a question of fact. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given to the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In the present case, there was simply conflicting evidence, and it was the province of the hearing officer to resolve these conflicts. The hearing officer heard all the arguments concerning the claimant's credibility at the hearing, and he specifically found the claimant credible and persuasive in her account. Applying the above standard of review, we find that the hearing officer's finding of injury was sufficiently supported by the evidence in the record.

Disability is also a question of fact. To the extent that there was conflicting evidence regarding disability, it was the province of the hearing officer to resolve these conflicts. We perceive no legal error in the hearing officer's resolution of the disability issue.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **TRAVELERS INDEMNITY COMPANY OF CONNECTICUT** and the name and address of its registered agent for service of process is

**CT CORPORATION**
**350 NORTH ST. PAUL STREET**
**DALLAS, TEXAS 75201**.

_____
Michael B. McShane
Appeals Panel
Manager/Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Robert W. Potts
Appeals Judge